No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a corporation,
Appellant,

vs.

SPIEGEL, INC., a corporation,
Appellee

APPELLEE'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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JURISDICTION

No contention is made by the appellee that jurisdiction does not exist in this Court, or that it did not exist in the District Court, and the appellant's jurisdictional statement is accepted as correct.

STATEMENT OF THE CASE

The appellant's statement of the case is not in all respects accurate and requires some amplification to clearly present the issues.

The plaintiff's complaint seeks recovery of a sum of money alleged to be due as an excess of taxes by virtue of the terms of a sublease between the parties. There is attached to the complaint a copy of the lease (R. 6) and the sublease (R. 15). The answer admits the execution and delivery of the lease and sublease (R. 22) and denies the existence of the obligation alleged by the plaintiff.

At the trial the plaintiff sought to introduce evidence of the circumstances attending the drafting and execution of the sublease, evidence of the intention of the parties, and contended that the instrument was an assignment and not a sublease as it had been designated in the pleadings. The defendant objected to all of such testimony and evidence upon the ground that the negotiations of the parties had been integrated into a written document (R. 45, 46, 59) and that extrinsic evidence was not admissible to vary its terms. The evidence was nevertheless received over objection. Despite this testimony of plaintiff's President, and the other evidence admitted over objection, the trial court found as a fact (R. 31, 32):

(1) That there was no provision in the sublease obligating the defendant to pay any excess of taxes; and

(2) That there was no intention on the part of the parties to the sublease, as alleged in plaintiff's complaint, that the defendant should assume and agree to pay any such excess of taxes.

In appellant's statement of the case it is asserted that Mr. Coles was not represented by an attorney during negotiations for the sale of the business in connection with which the sublease was entered into, and that the sublease was prepared by Spiegel's attorney in Chicago and signed there by Mr. Coles without advice of counsel.

Since this contention is referred to throughout appellant's brief, and legal significance is attached to it, appellee desires to point out that these facts are in some respects in sharp dispute and in some respects incorrect. Mr. Klein, attorney for Spiegel, testified that the transaction was not closed during the course of Mr. Coles' visit to Chicago (R. 93) but was closed some time later in Phoenix (R. 94). In particular, he testified that the sublease was drafted after the conference in Chicago and mailed to Mr. Coles in Phoenix (R. 94). This is consistent with the face of the sublease which shows that it was acknowledged by an official of Spiegel in Chicago on July 17th and was acknowledged by Mr. Coles in Phoenix on July 23rd. The acknowledgment by Mr. Coles was before Mr. Blaine B. Shimmel, who was Mr. Coles' attorney and who represented him in the trial court (R. 21). Moreover, Mr. Coles admitted on cross-examination that he had consulted Mr. Shimmel during the course of negotiations (R. 63). And, finally, Mr. Shimmel himself admitted that he did participate in the transaction on behalf of Mr. Coles prior to the time it was closed (R. 94). Mr. Coles, therefore, by his own admission and that of his attorney was represented by counsel in the negotiations and in the consummation of the transaction.

The overlying lease provided that there could be no assignment or subletting without the consent of the lessors (R. 9). In connection with the consummation of the transaction, and pursuant to this requirement, Coles made a written request to the Valley National Bank, as Trustee under the Will of the lessors, for permission to sublease the premises to Spiegel, and enclosed a copy of the proposed sublease (R. 68-69). In granting permission to sub-

let to Spiegel, the Trustee referred to certain provisions in the sublease at variance with the overlying lease, and pointed out that those provisions were between the tenant and sub-tenant only and consent was given upon the express understanding that the provisions of the overlying lease remained binding upon the tenant and that the lessor would continue to look to the original tenant to carry out the provisions of the lease "anything to the contrary in the sublease notwithstanding." (R. 72, 73)

Following the execution and delivery of the sublease, it was supplemented and amended by agreements providing that the original lessors would notify Spiegel in the event Coles defaulted in the performance of any of its obligations, and that in such event Spiegel could cure the default and charge the amount thereof against any rental due Coles from Spiegel. (Defendant's Exhibit E in evidence; R. 78). At the time these provisions were negotiated, Mr. Klein corresponded with Mr. Shimmel and attempted to persuade Mr. Shimmel to agree that in the event Coles defaulted Spiegel could take an assignment of Coles' interest in the lease (R. 84). Mr. Shimmel refused upon the ground that this would eliminate the sublease which was never contemplated (Defendant's Exhibit F in evidence; R. 86).

There were no further negotiations or documents executed, and the parties entered upon the performance of their respective agreements until the present controversy arose. During that period of time the Phoenix store paid certain items that properly were not the obligations of Spiegel under the sublease. The items were minor and the error was not discovered until demand was made upon Spiegel for payment of excess of taxes, at which time the

matter was referred to the legal department (R. 88-89). It was thereupon determined that the obligations for excess of taxes as well as the minor items which had been paid without question were the obligations of Coles and not Spiegel and Spiegel refused to pay them. This action ensued.

SUMMARY OF ARGUMENT

Appellant in its summary of argument assumes that the only purpose which the parties could have for attaching a copy of the overlying lease to the sublease would be to cause the sublessee to undertake the performance of all obligations of the overlying lease. Therefore, since the overlease was attached and referred to, the subtenant did assume the obligations of the primary lease, and that, sayeth the plaintiff, is that. The appellant continues from this novel proposition to the even more novel proposition that if a party desires to escape liability for the payment of someone else's obligations, it must insert a provision in the agreement saying it will not be responsible for such obligations. This is somewhat remote from the orthodox concept that before a defendant may be charged with an obligation in a written instrument there must be a covenant or promise to pay.

It is the appellee's position that the sublease is clear, definite and unambiguous and as such, extrinsic evidence may not be resorted to for the purpose of altering or varying its meaning. The only language referring to the primary or overlying lease is the phrase "subject to the terms of." This language is language of limitation and not of assumption, and creates no obligation and infers no promise. Further, the instrument in question is not an

assignment but a true sublease; but whether or not it is an assignment or a sublease, the appellee is not bound by the covenants of the primary lease because it has contracted not to be.

ARGUMENT

I.

There Was No Assumption by Spiegel of the Obligation of Coles to Pay Excess Taxes

The entire burden of the first half of appellant's argument is to convince this Court that it ought to "construe" an obligation to pay taxes upon Spiegel, Inc. where there is no such express undertaking. Before answering appellant's "construction argument" it is well to point out that this is not an action to reform an instrument to express an intention which appellant would now desire to incorporate into it. It is an action to recover a sum of money based upon the language of a written instrument which is not in dispute and which is not ambiguous. Both parties were represented by counsel in the matter, and if the instrument did not express the intention of the parties there was ample opportunity to correct it. Appellant insists if Spiegel did not intend to become obligated to pay taxes it should have said so. Appellee perfers to believe the law to be that it is incumbent upon a party seeking to impose an obligation to clearly provide for it in the instrument and not leave the imposition of that obligation to the court as a matter of construction or implication. As a matter of elementary draftsmanship, it is difficult to believe that Coles' attorney would not have expressly inserted a promise by Spiegel to pay taxes if that obligation was intended to exist. The distinction between the phrase "subject to the terms of" and the phrase "assume and

agree to pay and perform according to the terms of" is so universally recognized and in such day-to-day use among attorneys that it is impossible to believe that the distinction was overlooked.

In any event it is the position of the appellee that the phrase "subject to the terms of" is plain, unambiguous and with a well-defined meaning and creates no affirmative obligation to pay. There is no other language in the instrument which even remotely suggests an affirmative obligation to pay. Under those circumstances it is evident that extrinsic evidence may not be referred to for the purpose of altering the plain meaning of the document, for it is conclusively presumed that the entire agreement of the parties is contained in that writing (see: 20 Am. Jur. par. 1099, p. 958).

Among the cases supporting the appellee's position regarding the effect of the words "subject to" are the following:

Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N.E. 1105 (1896);

Meyer v. Alliance Inv. Co., 84 N.J.L. 450, 87 Atl. 476 (1913);

Englestein v. Mintz, 345 Ill. 48, 177 N.E. 746 (1931);

Cox v. Butts, 48 Okla. 147, 149 Pac 1090 (1915);

S. T. McKnight Co. v. Central Hanover Bank & Trust Co., 120 F.2d 310 (CCA 8th Circuit 1941);

Hart v. Socony-Vacuum Oil Co., 291 N.Y. 13, 50 N.E. 2d 285;

Cockerill v. Tobin, 59 Cal. App. 112, 209 Pac. 1022 (1922);

Reid v. Weissner, 88 Md. 234, 40 Atl. 877 (1898).

One of the best examples of this distinction may be found in the case of *Consolidated Coal Co. v. Peers, supra.* In this case there was an assignment of a lease "subject to the agreements therein mentioned to be performed by said Lessee." The plaintiffs as the original lessors filed suit against the defendants to recover upon the ground that the quoted portion of the lease in the instrument imposed an affirmative obligation upon the defendant to perform the terms of the lease. The Court held that the language did not create an affirmative obligation to pay. Said the Court at page 1109:

> "There are several considerations that lead us to the conclusion that the words 'subject to the agreement,' etc., used in the deed of August 11, 1886, do not import a covenant on the part of the assignee to personally pay all rents or royalties that may accrue during the term: First. The weight of authority is otherwise. Second. The rule deducible from the decisions of this court in analogous cases is otherwise. Third. As has been suggested in some of the cases, it is the duty of a party who intends by a deed to bind another by a covenant in a former formal instrument to insert such covenant in the deed in such distinct and intelligible terms as that the party to be bound cannot be deceived, and not call upon the courts to infer such a covenant from equivocal words, which were probably understood by one party in a sense different from that sought to be ascribed to them by the other. Fourth. The assignee always takes the estate cum onere,—that is, he takes and holds it subject to the agreements agreed to be performed by the lessee,—and it is difficult to perceive why, upon sound legal principle, the mere expression of this legal implication should create a personal contractual obliga-

tion which the legal implication itself would not create. Fifth. It is the public policy of this state that the transmissibility of property should be free and unfettered; and to hold from mere inference, and in the absence of an express and plain covenant, that the assignee of a lease and his heirs will be personally liable for the payment of reserved rents which may accrue perhaps hundreds of years after such assignee has sold and assigned the lease to a third person, would tend to make leasehold estates unsalable, and tend to prevent the transfer of them to others."

Another case in point is that of *Meyer v. Alliance Inv. Co., supra,* in which there was an assignment of a lease subject to the terms and conditions and covenants contained in the lease. Said the Court at page 477:

"The claim of the plaintiffs to recover rent of the defendant rests upon the words of the consent, 'subject to all the terms, conditions and covenants contained in said lease.' As Lord Denman said in a similar case: 'These are words of qualification and not of contract.' Wolveridge v. Steward, 1 Cromp. & M. 644. The case is similar to a conveyance of land subject to a mortgage. The grantee is not personally bound unless there are words equivalent to an assumption of the mortgage. * * *"

In *Cox v. Butts, supra,* there was an assignment of a lease by one who was himself an assignee. The assignment was made "subject to the terms and conditions of said lease". The question was whether the subsequent assignee by those words had promised to perform certain obligations in the original lease. The Court held that the words "subject to" did not create any personal obligation

on the assignee to carry out the terms of the original contract. Said the Court at page 1092:

> "For the foregoing reasons we hold that there was no personal obligation placed upon Butts in the assignment to him, or in the contract agreement between him and Cox, whereby he became liable personally for any more than one-eighth of the expense incurred in development of the oil lease. The actual intent between Cox and Butts might, in fact, have been as plaintiff contends, but we cannot look further than the wording of the contract itself. It is the duty of one party who intends to bind another to do a certain thing by covenant in any written instrument to word the contract by the use of distinct and intelligible terms, so that there can be no misunderstanding and not call upon the courts to infer that the contract was intended to be a certain way, which was probably understood by one party in a sense different from that sought to be ascribed by the other."

In *Englestein v. Mintz, supra,* the Court had for consideration the meaning of the words "this agreement is subject to agreement this day entered into between Kaplan and Mintz and all covenants and agreements therein mentioned." The Court held that language was not uncertain nor ambiguous and did not impose any affirmative obligation to perform the terms of the agreement referred to. Said the Court at page 752:

> " * * * The words 'subject to,' used in their ordinary sense, mean 'subordinate to,' 'subservient to' or 'limited by.' There is nothing in the use of the words 'subject to,' in their ordinary use, which would even hint at the creation of affirmative rights. * * *"

The same situation has been passed upon by the Eighth Circuit Court of Appeals in the *S. T. McKnight Co. v. Central Hanover Bank & Trust Co., supra,* case. In this case there was an assignment of a lease "subject to all the terms and conditions of said lease." The Court held that the quoted words were not words of contract and did not import an affirmative obligation on the assignee. Circuit Judge Woodrough said at page 320:

> "But we are not so persuaded. We agree with the declaration of the trial court: 'That the words "subject to all the terms and conditions of said lease" do not impose contractual liability on an assignee to a lessor to carry out the covenants of a lease, seems to be the well supported rule. That they are words of qualification and not of contract appears to be well settled. See Wolveridge v. Steward, 1 Cromp. & M. 644. Also Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 NE 1105 (38 LRA 624); Meyer v. Alliance Investment Co. 84 NJL 450, 87 A. 476. If we look for analogy to cases where land is conveyed subject to a mortgage, we find that Minnesota, in common with many other states, holds that land conveyed subject to a mortgage does not render the grantee personally liable unless by agreement he promises to pay or assume the debt. Clifford v. Minor, 76 Minn. 12, 78 NW 861. Manning v. Cullen, 50 Minn. 568, 52 NW 973.' "

It is respectfully submitted that the words "subject to" simply mean that unless the terms of the original lease are complied with that term will expire. Those words, however, do not define *whose* obligation it is to comply with the terms of the primary lease. If there is no assumption

of the terms of the sublease, the obligation remains that of the sublessor. Such is this case.

Appellant cites only one case, that of *Homan v. Employers' Reinsurance Corp.*, 345 Mo. 650, 136 S.W. (2d) 289 (1939) in support of its position that the words "subject to" impose an affirmative obligation. We believe a careful reading of the opinion does not support that conclusion. The phrase "subject to" in that case referred to a subsequent undertaking and not to a prior undertaking as in the present case. (See opinion at page 298.) Moreover the Court pointed out that the creation of the obligation was by other portions of the contract and that the words "subject to" were not used in the sense of creating the obligation, but rather of defining it. The opinion on rehearing makes this clear and is in fact additional authority for the appellee in the instant case. Said the Court at page 302 of the Unofficial Reporter:

> "It is further insisted that the words 'subject to' as used in the reinsurance agreement imply no assumption of obligation or liability. Cases are cited to the effect that when a grantee takes title to land by deed reciting that the conveyance is 'subject to' certain incumbrances, that the deed imposes no personal obligation or liability. * * *. It is said: 'The words "subject to," used in their ordinary sense, mean "subordinate to," "subservient to" or "limited by." There is nothing in the use of the words "subject to," in their ordinary use, which would even hint at the creation of affirmative rights.' Englestein v. Mintz, 345 Ill. 48, 177 N.E. 746, 752. However, this contention overlooks the fact that we are construing a contract of reinsurance which 'applies to the liability of the reinsured' and that such a contract necessarily implies

> the assumption of personal obligation and liability by the reinsurer, the extent of which is to be determined in the usual and ordinary manner by the consideration of the instrument itself and the words used therein and the references made. *The reinsurance contract creates the obligation and not the words 'subject to'.*" (Emphasis supplied.)

Appellant also cites the case of *City of Lake View v. MacRitchie,* 134 Ill. 203, 25 N.E. 663 (1890), in support of its contention that a reference to another document imposes an affirmative obligation to be bound by its terms. Again we must disagree. That was an action on a contractor's bond. The bond did refer to the contract and plans and specifications attached thereto. But the bond contained an express promise and undertaking on the part of the sureties obligating them to perform the contract and to indemnify the obligee in the event it was not performed according to its terms. In both cases cited by the appellant there is a well-defined original undertaking or promise. In the instant case that promise is the very element that is lacking.

If the Court agrees that the phrase "subject to" does have a well-defined meaning, then the parties are bound by their express undertaking and matters of "construction" become unimportant. As a matter of fact, under such circumstances extrinsic evidence is not admissible to vary the terms of the written instrument (20 Am. Jur. par. 1144, p. 998) and should not properly be considered where objection was made to its reception. Appellee believes, however, that its position is likewise supported in matters of construction and to that end will consider the arguments of the appellant on this phase of the case.

Appellant asserts that because the primary lease was attached to the sublease and made a part of it, that this fact is sufficient to "construe" an obligation upon the lessee that it did not expressly promise to perform. This argument has its foundation upon the assumption that the only purpose for attaching a copy of the overlease is to assume its obligations. Such an assumption overlooks the distinction between "promises" and "conditions." The promises to which Spiegel obligated itself were contained in the sublease. However, both parties recognized that there were conditions in the primary lease which, unless maintained, would terminate the leasehold estate. The primary lease was attached to disclose those terms and conditions. It is a complete non sequitur to conclude that because those conditions exist the sublessee is obligated to perform them. The trustee for the original lessors, in giving its consent to the sublease, clearly stated that it would expect all of the terms of the original lease to be performed by Coles irrespective of the agreement between the sublessor and the sublessee (Defendant's Exhibit B, R. 71, 73). Moreover, Spiegel and Coles agreed that should Coles become in default under the terms of its primary lease, Spiegel could cure the default and charge the cost and expense against rental due Coles (R. 78). Spiegel, therefore, had a vital interest in knowing just what the provisions, conditions and limitations of that primary lease were, and it was attached and made a part of the sublease for that reason.

Appellant points to the "nowithstanding" clause in the sublease as lending support to its contention that an obligation should be "construed" upon the subtenant. In doing so it elects to misinterpret the provisions of the

sublease and the overlease. For instance, it is argued that unless Spiegel thought itself bound to make structural repairs there was no reason to provide in a sublease that it should not be required to make them "notwithstanding anything in the overlease." The inference is that the overlease obligates the lessee to make structural repairs and that by this exception Spiegel is relieving itself from an obligation it had otherwise assumed. The fallacy is that there is nothing in the original lease requiring Coles to make structural repairs as such and therefore no obligation which Spiegel is required to protect itself against. The provision regarding structural repairs is in the sublease only. It obligates Coles to make all such, and provides that Spiegel shall maintain the building in good repair "except as to such structural repairs" (R. 17). Another example of this misconception of the distinction between a "condition" and a "covenant" is appellant's argument that a provision in the sublease requiring Coles to use its best efforts to persuade the owner to allow Spiegel to sublease, is proof of an assumption (Appellant's Brief, page 10). Appellant asserts that this provision plainly shows Spiegel considered itself bound by the overlease which prohibits subletting without the permission of the owner. The argument is completely fallacious. Spiegel was not bound by this provision in any sense that it was a covenant the performance of which it had "assumed". It was bound only in the sense that this was a condition or limitation on the estate, which if not complied with would terminate the tenancy just as a tenancy might be terminated by failure of Coles to pay rent. As a matter of fact, if the parties had considered Spiegel in any direct relationship with the original lessor,

contractual or otherwise, there would have been no occasion to provide that Coles should importune the original lessor for permission for Spiegel to sublet—Spiegel would have asked the original lessor for its consent directly. The provision would rather seem to make plain the fact that the parties recognize that the contract between the original lessor and Coles created one relationship and the contract between Coles and Spiegel created an entirely distinct and separate relationship. This, and the other provisions which are likewise misconstrued by appellant, simply demonstrate that the parties to the sublease intended to enter into their own agreement upon their own terms and in their own manner "notwithstanding any provisions of the overlease," except to recognize that the subtenancy was "subject to" or "subordinate to" or "limited by" the terms of the leasehold estate which they were dealing with. There is certainly nothing unusual, ambiguous or mysterious in that.

Appellant again, as a matter of "construction," refers to the testimony of Mr. Klein and ridicules his explanation for the differences which exist between the original lease and the sublease. As already pointed out, those differences are not all by any means "exceptions from the terms of the original lease." Several of the clauses are provisions which were apparently negotiated without reference to clauses of any similar kind in the primary lease. For instance, paragraph (e) with respect to eminent domain is an entirely different provision from anything in the primary lease and is simply a matter of negotiation. The same is true as to paragraph (d) with respect so Spiegel's

right to withhold rentals to apply on any indebtedness of the original lessee.

Nor is the construction which the parties have placed upon the instrument at variance with the position of the appellee. In the first place, the construction which parties place upon their contract has interpretive significance only where the language of the contract is doubtful or ambiguous. *Atlantic Refining Co. v. Wyoming National Bank,* 356 Pa. 226, 51 Atl. (2) 719 (1947). Here the contract is not ambiguous. Appellant, however, argues that since Coles had no further interest in the business it could want no further interest in the building and that the logical answer would be to have the new tenant assume the obligations of the lease, which it contends was done here. That is neither a logical answer nor was it in fact done. Coles did have a decided interest in the building because it owned a valuable leasehold. It was paying $1,850.00 per month rental and receiving $3,850.00 rental from its subtenant. If this subtenant defaulted, Coles would have a definite interest in renting to another subtenant on equally advantageous terms. Moreover, if Coles had desired or intended to step aside and put Spiegel in its place that would have been considerably easier than to have prepared a sublease. It would have been a simple routine matter to have assigned the lease with an express assumption of its obligations by the assignee. Not having been done, and both parties having been represented by counsel, one can only conclude that they did not desire such a result. It is true that Spiegel has made payment of certain items of the primary lease. Mr. Klein testified that those payments were made by the local store without benefit of a copy of the lease, and when the matter was first called

to the attention of the legal department the payments were stopped at once. There were, moreover, items in the primary lease which Spiegel did not pay. One was the primary rental and other was a provision obligating the original lessee to provide public liability insurance (R. 9). Appellant can surely not seriously contend that the voluntary payment of minor items in error can create an assumption of obligations not in fact undertaken. Evidence of such payments, in the light of the testimony and the plain language of the instrument, has no such probative force as asserted by the appellant.

If matters of the parties' construction are to be taken into account, attention should be directed to the fact that the parties agreed that in the event Coles should default in its obligations as lessee, Spiegel might cure the default and charge the expense thereof against rental due to Coles. If it was not recognized that Coles retained certain obligations there would be no reason for such provision.

From all the foregoing, it is submitted that the sublease is plain and unambiguous and contains no promise requiring Spiegel to perform the obligations of the original lessee; and that the words "subject to" have a well-defined meaning limiting the rights of the parties but creating no affirmative obligations. It is further submitted that since the lease is unambiguous, extrinsic evidence regarding intention or construction is inadmissible to vary its terms, but that even if such be considered, it only goes to further support the position of appellee, and the Honorable Trial Judge was correct in his conclusions.

II.

The Sublease Is Not an Assignment and Does Not Create an Obligation to Pay Taxes as a Matter of Law

The question as to whether an agreement constitutes an assignment or a sublease most frequently has arisen in a contest between the original lessor and the alleged lessee. The general rule developed from those cases undoubtedly is that where the entire reversionary estate is transferred, an assignment is created, but where any reversionary interest is retained, however small, a sublease is created.

51 C.J.S. 556;

Hobbs v. Cawley, 35 N.M. 413, 299 P. 1073 (1931);

Shreck v. Coates, 59 Ariz. 269, 126 P. (2d) 308 (1942);

Indian Ref. Co. v. Roberts, 97 Ind. App. 615, 181 N.E. 283 (1932).

Moreover, the authorities support the proposition that although an assignment may be created as far as the original lessor and the so-called assignee are concerned, the instrument may still retain its character as a sublease as between the sublessor and sublessee where the parties so intended.

Orr v. Neilly, 67 Fed. (2d) 423 (CCA 5th 1933);

Saling v. Flesch, 86 Mont. 106, 277 Pac. 612 (1929);

Hobbs v. Cawley, supra.

The Court in the case of *Indian Refining Co. v. Roberts, supra,* collects and reviews in a scholarly manner a great many of the decided authorities upon the question. That case is of particular value not only because of its careful and exhaustive discussion, but also because it is on the facts quite analogous to the present case. The owner

leased to one Donn Roberts. Roberts, in turn, leased to the appellant. There was no right of reentry reserved in this sublease by Roberts, but the appellant as sublessee had a right to terminate on ten days' notice. Moreover, the Court pointed out that the sublessor was given a right of entry by statute. There were also additional terms in the sublease. The Court held that the instrument was a sublease and not an assignment, saying at page 290 of the unofficial report:

> "It is to be noted that Donn M. Roberts held the premises in question for a 'term of three years, commencing November 1, 1929,' without any limitation or possibility of termination on his part whatever; that appellant took the premises from Donn M. Roberts for a term of 'three years from Nov. 1st, 1929,' retaining in itself the right to terminate by giving a specified notice. In other words, Donn M. Roberts held the premises for a term of years unlimited; appellant held the premises for a term of years with a 'special limitation.' Appellant might have occupied the premises for ten days, six months, or for the full three years. Under such circumstances, it cannot be said that appellant received all the interest in the term held by Donn M. Roberts, but it must be conceded that Donn M. Roberts retained some interest in the premises to himself. Under the authorities, supra, if the lessee, Donn M. Roberts, retained some interest, no matter how small, the transaction is thereby prevented from being an assignment, but is a sublease as between the original lessor, appellee herein, and the subsequent lessee, appellant herein. Donn M. Roberts not having parted with his entire interest in the term, but having retained an interest in such term, we hold the instrument in question to

be a sublease and not an assignment as between appellee and appellant. Appellant, therefore, is in no manner bound by the covenants in the original lease.

"Judgment reversed, with instructions to sustain appellant's motion for a new trial."

The Arizona Court appears to follow the rule announced in the majority of cases that where substantial rights are reserved to the original lessee, the instrument is a sublease and not an assignment. In that case the alleged sublessee took the property for the balance of the term, but the Arizona Court nevertheless held the transaction to constitute a sublease and not an assignment, saying at page 277 of the official report:

"An examination of the contract between Barnes and the lessees, we think clearly shows that the entire interest of the lessees in the original lease was not turned over to Barnes. This is very evident from the fact that the lessees retained the right to carry on operations to the amount of 21,000 yards a month. They reserved the right to reenter and take possession of the mines upon the failure of Barnes to perform the conditions of the original lease or his contract with them. They reserved some very substantial rights; for instance, the right to have the rental of 10% applied on the purchase price, the right to enter upon the workings of Barnes for the purpose of inspecting his work and keeping advised as to what he was doing and as to the condition of his operations."

The Supreme Court of the United States appears to follow the same rule that where the terms of the sublease are materially different, the instrument is not an assignment but is a sublease.

In the case of *United States v. Patrick J. Hickey,* 17 Wall. 9-14, 21 L. Ed. 559 (1873) Mr. Justice Hunt stated:

> "It is said that the transaction with Hickey was an assignment to him by the United States, and not an underletting. It was not an assignment, as the terms between the United States and Hickey were different from those between Eldridge and the United States. * * *"

It is, of course, apparent here that the terms and conditions between Coles and Spiegel are materially different both as to rental reserved and as to the other provisions of the document. Moreover, it is likewise clear that there is a definite reversionary interest retained by the sublessor. What is that reversionary interest? In the first place, it is a right of entry in the sublessor either for nonpayment of rent or for breach of any covenant in the sublease by the sublessee. The right of entry is contained in Section 27-1215 Ariz. Code Annot. 1939, providing as follows:

> "(a) Whenever a tenant shall neglect or refuse to pay his rent when due and in arrears for five (5) days, or whenever any tenant shall violate any of the provisions of his lease, the landlord or person to whom said rent is due, or his agent, may re-enter and take possession, or, without any formal demand or re-entry, commence an action for the recovery of the possession of said premises."

This is the same type of statutory right of entry mentioned by the Court in the case of *Indian Refining Co. v. Roberts, supra.* It would create a reversion in the sublessor in the event of nonpayment of rent or in the event Spiegel failed to maintain the building in good condition

and repair as in the sublease provided. Secondly, the sublessee has a right to cancel or terminate the sublease in the event the sublessor fails to restore, should a fire occur, or in the event of a taking by eminent domain. These rights also create reversionary interests of the same kind as set out in the *Indian Refining Company case* and many other cases cited in it. Finally, the terms and conditions are materially different within the rule set out in the Arizona case of *Shreck v. Coates, supra,* and the case of *United States v. Hickey, supra.*

That the parties intended the instrument in question to be a sublease, within the ruling of the cases cited herein, is conclusively shown by the following facts:

1. The parties negotiated for a sublease.

2. The original lessor gave its consent to a sublease and not to an assignment.

3. The instrument was designated as a sublease and referred to throughout as such.

4. When Mr. Klein, for Spiegel, later asked Mr. Shimmel representing Coles, to consent to an assignment in the event Coles defaulted in the primary lease, Mr. Shimmel responded:

> "But with reference to the agreement between Coles Trading Company and Spiegel, I see no basis for the former to agree to *assign* the lease to Spiegel. Such an assignment would have the effect of eliminating the sublease, and this, of course, *was never contemplated.*" (Emphasis ours)
>
> (Defendant's Exhibit F in evidence, R. 86)

5. The plaintiff's complaint in the District Court was filed upon an agreement designated as a sublease, and the complaint refers to a sublease throughout. In fact, proof

that the assignment theory is a complete afterthought is evidenced from the fact that an assignment is nowhere mentioned by the plaintiff in its pleadings, and the plaintiff did not even seek to amend to designate the instrument as "an assignment erroneously designated as a sublease" as it undoubtedly would have done had it considered the instrument as such.

Appellant cites the cases of *Marathon Oil Co. v. Lambert,* 103 S.W. (2d) 176 (Tex. Civ. App. 1937) and *Consolidated Coach Corp. v. Consolidated Realty Co.,* 251 Ky. 614, 65 S.W. (2d) 724 (1933) as holding that an assignment of the balance of the term creates an assignment and not a subtenancy. It is to be noted that both of those cases were actions between the original lessor and the alleged assignee or subtenant. As pointed out in the cases already referred to by appellee, those cases cited by appellant are not authority for a fact situation where the controversy is between the sublessor and sublessee.

Finally, having undertaken to prove that the instrument is an assignment, the appellant concludes that Spiegel, as assignee, is liable to pay the taxes because the covenant to pay taxes is one which runs with the land. In this connection, it is particularly interesting to refer the Court again to the agreement of December 10th between the parties (R. 78). In this agreement which supplements the lease and was amendatory thereto, Coles agreed that if it defaulted in its obligations under the lease Spiegel could cure any such default and the amount of that cost and expense would be immediately due and owing by Coles to Spiegel and Spiegel should have the right to deduct the cost from any rental due from Spiegel to Coles. An as-

signee may be responsible to his assignor in the case of a true assignment because the law implies a promise on the part of the assignee to perform certain covenants which touch and concern the land (see: 32 Am. Jur. par. 348, p. 306). As indicated in several of the cases cited by appellant (Appellant's Brief p. 21) the imposition of the obligation is ordinarily by way of subrogation—i.e. the assignor having paid, is subrogated to the right of the original lessor to enforce the payment from the assignee. The equitable doctrine of subrogation, however, is a doctrine that may be modified or extinguished by contract (see: *Northern Trust Co. v. Consolidated Elevator Co.* 142 Minn. 132, 171 N.W. 265 (1919)). Whether Spiegel is a sublessee or an assignee and whether the liability for taxes is asserted by "implication" or by "subrogation," it clearly appears that the parties have contracted to the contrary. Spiegel perceives no reason why this contract should not be valid.

The unreasonableness of the position which Coles has taken is demonstrated when its theory is carried to its ultimate conclusion. Taxes should be paid by Spiegel, appellant argues, because the obligation to pay taxes "runs with the land." But so does the obligation to pay rent! Will appellant next contend that Spiegel owes not only its approximate $4,000.00 per month rental to Coles under the sublease, but in addition the $1850.00 per month rental of Coles under the original lease? If Spiegel is obliged to pay Coles' taxes because they run with the land, why not Coles' rent in addition? The same argument applies to appellant's assumption theory. If Spiegel has "assumed" the obligation to pay taxes by virtue of all the mysterious abracadabra of appellant, has it also "as-

sumed'' the obligation to pay Coles' rental as reserved in the original lease? If such be the case, a monstrous burden has been ''construed'' upon Spiegel and Coles has relieved itself of its own obligations and obtained the advantage of a double rent. If ever a party should be estopped by its own conduct, Coles in this case should be estopped from now claiming that the instrument designated as a sublease is in fact an assignment. Spiegel has undertaken weighty and long-term obligations upon the representations and insistence of Coles that the parties were bound according to the terms of the instrument designated as a sublease and considered by all of the parties as a sublease. For Coles to be permitted now to change its position and assert the instrument to be an assignment, not only imposes gross inequities upon Spiegel, but could even jeopardize the tenancy which Spiegel requires in order to maintain its obligations.

CONCLUSION

Appellant concludes its brief with the apology that the arrangement it suggests may be inartistic but that artistry is not a prerequisite to legality. To say that the arrangement appellant suggests is inartistic is, to say the least, the last word in understatement. Appellant is desperately grasping at commas to torture the instrument into saying something it clearly does not; and to baldly assert it is an assignment after having insisted at great length throughout the negotiations and proceedings that it was a sublease should be a little embarrassing to anyone at all sensitive about honoring obligations.

Appellee believes the instrument is just what it says that it is and what the appellant—up to now—has insisted that it remain, to wit: a sublease; and that it creates no obligations beyond those set out in its plain terms.

Wherefore, Spiegel, Inc. respectfully urges this Honorable Court to affirm the judgment of the District Judge.

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